



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Q-Dot, Inc.

File: B-235688

Date: September 28, 1989

DIGEST

Protester's claim that its proprietary data rights under a contract awarded pursuant to the Department of Defense's Small Business Innovation Research program have been violated is dismissed where the appropriate remedy is administrative settlement of its claim or a judicial action against the government for damages rather than consideration under the bid protest function of the General Accounting Office.

DECISION

Q-Dot, Inc., protests the failure of the Department of the Air Force, Arnold Engineering Development Center, to award it a Phase II contract pursuant to solicitation No. AF87-026, issued under the Department of Defense (DOD) Small Business Innovation Research (SBIR) program. Under Phase I of the project, Q-Dot and three other offerors received contracts to develop a full bandwidth, direct pulse-to-digital converter system for turbine flowmeter measurement of fluid flows and rotor speeds during engine and rocket propulsion testing. Q-Dot asserts that award of a Phase II contract to any contractor other than Q-Dot will violate the firm's SBIR proprietary data rights because the specifications issued to proposed contractors for Phase II of the program utilized Q-Dot's SBIR technical data from its Phase I contract.

We dismiss the protest.

The solicitation was issued under the DOD SBIR program on October 1, 1986. This program was established under the Small Business Innovation Development Act, 15 U.S.C. § 638 (1982), which requires federal agencies to reserve a portion of their research and development efforts and

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authorizes them to award "funding agreements"^{1/} to small businesses based on evaluation of proposals submitted in response to solicitations issued pursuant to the Act.

The Phase I solicitation called for the design, construction, and demonstration of a single channel of a future 30-channel 1-step pulse-to-digital converter, and for a preliminary design for the 30-channel system. The SBIR solicitation further provided that, for Phase II--the production of a workable 30-channel prototype incorporating features developed under Phase I--no separate solicitation would be issued, as only those sources that were awarded Phase I contracts would be considered. There was no requirement that any Phase II contracts be awarded.

The Phase I solicitation also specified that material clearly marked as proprietary by an offeror would be treated in confidence to the extent permitted by law. In addition, Q-Dot's Phase I contract incorporated DOD Federal Acquisition Regulation Supplement (DFARS) § 252.227-7025, "Rights in Technical Data and Computer Software," which protects proprietary technology developed by small businesses under the SBIR program for a limited period of time after submission of a final report, and a "Validation of Restrictive Markings on Technical Data" clause, DFARS § 252.227-7037, which concerns prechallenge review permitting a contractor to defend its restrictive markings before release.

The Air Force received 41 proposals by the January 8, 1987, closing date and awarded four Phase I contracts in August 1987, one of which was later terminated for convenience. Q-Dot submitted its Phase I product in May 1988. That product, according to Q-Dot, detailed the technology by which the firm has achieved high accuracy together with high bandwidth for turbine flowmeters with high blade-to-blade variability. In its submission, Q-Dot marked its technological solution as proprietary under the SBIR Data Rights clauses.

On August 18, 1988, the Air Force issued specifications for Phase II of the procurement. That document, which was sent to all Phase I offerors, specified at paragraphs 7.3 and 7.4 of the Accuracy section that an "unweighted sliding average" shall be used to reduce the effects of non-uniform blade spacings on the flowmeter and that such averaging will

^{1/} These funding agreements can take the form of contracts, as in the case here, grants, or cooperative agreements. 15 U.S.C. § 638(e)(3).

impact the response of the converter. The Air Force received three Phase II proposals in September 1988, and has not completed its evaluation of those proposals.

Q-Dot protested to our Office on May 30, 1989, alleging that the Air Force had released Q-Dot's proprietary information in the August 1988 Phase II specifications. Q-Dot asserts that, although it had called the contracting officer shortly after receiving the Phase II specifications to inform the Air Force that paragraphs 7.3 and 7.4 contained Q-Dot proprietary data, the firm did not know until a May 18, 1989, telephone conversation with the Air Force project engineer that its proprietary data had been disclosed to other competitors.

The Air Force first argues that Q-Dot's protest is untimely since Q-Dot knew its basis for protest as of August 18, 1988, when the Phase II specifications were released, and did not protest to our Office until May 30, 1989, 9 months after the alleged improper release of proprietary information. Q-Dot disagrees, maintaining that it had no basis on which to protest the inclusion of the allegedly proprietary information until it was advised by the Air Force on May 18, 1989, that other firms had received the Phase II specifications. We need not resolve the question of timeliness, however, in view of our conclusion that the issues raised in the protest either are not appropriate for review by our Office or are premature.

With respect to Q-Dot's allegation that the Air Force violated its proprietary rights in data submitted by the firm in Phase I of the procurement, we have held that in the interest of preserving the integrity of the government as purchaser, and of avoiding possible legal liability, the government should recognize a firm's proprietary rights and not use or disclose proprietary information for procurement purposes unless it has acquired the rights to do so. 52 Comp. Gen. 312 (1972). To this end, we have also maintained that the appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim. Del Mar Avionics--Reconsideration, B-231124.2, Feb. 9, 1989, 89-1 CPD ¶ 131.

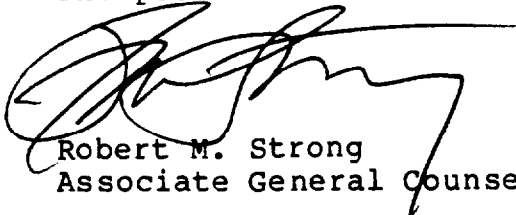
It is clear that the SBIR program regulations provide small business contractors with specific rights in technical data and computer software. See DFARS § 52.227-7025. In addition, Q-Dot's Phase I contract included a "Validation of Restrictive Markings on Technical Data" clause, DFARS § 252.227-7037, which requires the contracting officer to conduct a prechallenge review permitting a contractor to

defend its restrictive marking before a contractor's data is released. Q-Dot maintains that it marked its Phase I contract submission with the restrictive legend to be applied to material a contractor considers to be proprietary, and that the Air Force never conducted a prechallenge review or notified Q-Dot that data the firm considered proprietary was to be included in the Phase II specifications of the procurement. The Air Force maintains that paragraphs 7.3 and 7.4 of the Phase II specifications contain a technical concept that is common knowledge in the field of signal processing and is not proprietary to Q-Dot or in any way derived from Q-Dot's Phase I submission.

Accordingly, since Q-Dot is asserting that the Air Force infringed its proprietary rights without utilizing procedures in its Phase I contract, we find that Q-Dot's remedy lies in administrative settlement of its claim or judicial action against the Air Force for damages.

Moreover, we find premature Q-Dot's challenge to the Air Force's evaluation of the Phase II submissions as not in accordance with SBIR program procedures, since that evaluation has not been completed by the Air Force and no award has been made.

The protest is dismissed.



Robert M. Strong
Associate General Counsel